75-1905

~~No. 75-1095~~

IN THE

Supreme Court of the United States

October Term, 1976

ERNEST R. MULLENAX, PETITIONER,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONER ERNEST R. MULLENAX

JOSEPH B. EHRLICH,
MARC A. ROSENBERG,
Attorneys for Petitioner,
Office & P.O. Address,
200 Garden City Plaza,
Garden City, New York 11530.
Tel. No. 516-248-4300.

TABLE OF CONTENTS

TABLE OF CASES

STATUTES

IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1905

ERNEST R. MULLENAX,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONER ERNEST R. MULLENAX

1. The Brief in Opposition to the petition for a writ of certiorari argues that there is no conflict between the Second Circuit and Fifth Circuit in the respective decisions in *United States* v. *Gentile*, 530 F.2d 461, *cert. denied*, No. 75-6346, June 14, 1976, and *McClure* v. *First National Bank of Lubbock, Texas*, 497 F.2d 490, *cert. denied*, 420 U.S. 930 (1975) regarding the issue of whether a pledge of stock as collateral for a loan, brings the transaction within the purview of the federal securities laws. Respondent sets forth that the Fifth Circuit's decision in *McClure* concerned the issue raised in terms of the Securities Exchange Act of 1934, while the issue was

raised under the Securities Act of 1933 in *Gentile*. Respondent correctly notes that definition of the term "sale" under the two acts somewhat differs, but the Fifth Circuit's decision in *McClure* was not directly attendant to the definition of the term "sale" in the Securities Exchange Act of 1934, but hinged on the essential economic realities of the transaction before the court, *McClure* v. *First National Bank of Lubbock, Texas, supra*, 497 F.2d at 495, and was similar to this Court's line of reasoning in *United Housing Foundation, Inc.* v. *Forman*, 95 S. Ct. 2051, which spoke in terms of *both* the Securities Act of 1933 and the Securities Exchange Act of 1934. This Court in *Forman* clearly looked upon the economic realities of the transaction involved, and found that regardless of the fact that "stock" may have been involved, that the transaction was not a securities transaction, nor one which embraced the federal securities remedial legislation. *United Housing Foundation, Inc.* v. *Forman, supra*, 95 S. Ct. at 2058-2059, 2063.

The Fifth Circuit in *McClure* stated that the pledge of stock as collateral in a loan transaction would not embrace "the federal securities acts", and resultantly is in conflict with the Second Circuit's decision in *Gentile*. *McClure* v. *First National Bank of Lubbock, Texas, supra*, 497 F.2d at 495. Additionally, respondent notes that the Second Circuit's later decision in *Grenader* v. *Spitz*, 537 F.2d 612 (1976) did not mention or restrict its decision in *Gentile*. The point sought to be asserted in petitioner's brief to the Court was that the Second Circuit in *Gentile* in reversing the lower court decision specifically stated that the "literal" approach of bringing transactions within the two securities acts was "explicitly rejected" by this Court in *Forman*, and that this Court "stressed 'economic reality' " of the transactions in issue. *Grenader* v. *Spitz, supra*, 537 F.2d at 616, 617. Resultantly, conflict remains with the *Gentile* case, and other

authorities cited in the Brief in Opposition, and this Court is respectfully asked to clarify and consider the question whether the pledge of stock as collateral in a loan related transaction embraces the federal remedial legislation.

a. Respondent correctly notes that *C. N. S. Enterprises, Inc.* v. *G & G Enterprises, Inc.*, 508 F.2d 1354 (7th Cir. 1975), involved a question of whether promissory notes given to a bank in a loan related transaction constituted securities under the federal securities laws, and to this particular extent is distinguishable from the case at bar. However, in finding the promissory notes did not constitute securities in such regard, the Seventh Circuit employed the type of reasoning contained in the Court's *Forman* decision and referred to the "commercial-investment dichotomy" test as a standard for ascertaining whether the economic realities of the transaction involved embraced the federal securities laws. *C. N. S. Enterprises, Inc.* v. *G & G Enterprises, Inc., supra*, 508 F.2d at 1359-1361. In this regard, the Seventh Circuit, in apparent accord with the *Forman* standard, stated that a loan transaction was a commercial transaction angularly opposite to an investment transaction, the latter which are transactions intended to be embraced by the federal securities legislation. 508 F.2d at 1359. Consequently, the Seventh Circuit clearly implied in its dictum that a pledge of a security in connection with a loan related transaction is removed from the breadth of the federal securities law legislation.

2. The Brief in Opposition asserts that the Court in *Kastigar* v. *United States*, 406 U.S. 441 (1972), did not specifically mandate that a hearing be conducted by the trial court with reference to the prosecution's affirmative duty to establish that the immunized testimony

of a criminal defendant was not used in any respect in his criminal prosecution. Such posture would effectively abridge the Court's concern in *Kastigar* that a criminal defendant would "not . . . [be] . . . dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." *Kastigar* v. *United States, supra,* 406 U.S. at 460. Rudimentary principles and precepts in our mode of jurisprudence strongly suggest that the Court did not intend to obviate a defendant's right to examine and confront the critical issue raised in terms of his immunized testimony. To support the contention that affidavits submitted by the prosecution evidence its "affirmative duty" under *Kastigar*, without at a minimum an allowance by the defendant to examine and question the affiants, is not at all consonant with the concern of the Court that the defendant need not be dependent upon the good faith of the prosecution. In view of the district court's opinion in *United States* v. *Boyd*, 404 F. Supp. 413 (S.D.N.Y. 1975), that petitioner's immunized testimony touched on transactions which were before the Grand Jury; mentioned at least one person called as a witness at trial, in conjunction with other reasons raised before the Second Circuit,* a

---

* Petitioner noted the following to the Second Circuit in his brief to that court:

> "On or about August 22, 1975, appellant's counsel received a letter from one of the assistant United States attorneys involved in the prosecution, which stated in pertinent part:
>
> > 'Neither material contained in Referee Morton's findings and conclusions, nor that in the notes mentioned above (notes of appellant's testimony in the bankruptcy proceedings), is in any instance new to to us, and we hereby represent that all the evidence to be used against Mr. Mullenax in the trial of this case comes from sources independent of those notes,
>
> [Footnote continued on following page]

hearing was warranted. Otherwise, the protections meant to be secured by the Court in *Kastigar* v. *United States, supra,* 406 U.S. at 459-463, would be seriously diminished if not totally abrogated.

3. Repondent argues that the appropriate response to the jury's request for copies of the substantive statutes

---

> findings and conclusions and is in no instance derived from them in any manner.'
>
> [T]he other assistant United States Attorney, who was in charge of the prosecution, thereafter in an affidavit dated September 24, 1975, established that he was 'the assistant United States attorney who presented this case to the Grand Jury,' and that 'we are possessed (of a copy of Mullenax's bankruptcy testimony) but which we have never read.' Consequently, the trial court in denying *Kastigar* hearings left the following related issues open:
>
> 1) Even though not sufficient to negate the necessity of *Kastigar* hearings . . . [neither of the two Government attorneys] . . . proffered the representation that all the evidence used against appellant in the presentation of the case to the Grand Jury finding the instant indictment came from legitimate independent sources. Such representation was made with regard to the evidence to be used at trial. . . .
>
> 2) Even though the trial judge stated that . . . [the affidavit of the Government attorney in charge of the prosecution] . . . evidenced that 'no government attorney *read or* made use of that (Mullenax's bankruptcy) testimony', appellant was not afforded the opportunity to discover why the full transcript of Mullenax's bankruptcy testimony, possession of which by the Government was first revealed in . . . [the prosecutor's] . . . affidavit, was in the prosecution's hands in the first instance, and when and from whom it was received. Moreover, appellant was not afforded the right to discover whether Referee Morton's findings and conclusions dated and filed June 29, 1973, which make reference to appellant's bankruptcy testimony, was used in connection with the Grand Jury proceeding."

rested in the sound discretion of the trial court. It is submitted that the failure of the trial court to inform the jury that the language of the statutes did not embody all the critical and crucial elements of the offenses and reinstruct as to those elements clearly, under the facts in petitioner's case, was prejudicial error. Particularly so when petitioner's trial counsel specifically lodged objection to the trial court's submission of the statutes without reinstruction on the elements of knowledge, willfulness and intent. Specific intent was a critical element with reference to petitioner inasmuch as the allegations against him centered on alleged activity to defraud the banks and money lending institution. The securities counts were directly central to the question of whether petitioner was criminally implicated, and the pertinent substantive statutes totally lacked reference to the elements of knowledge, willfulness and intent. Petitioner's trial counsel feared that if the jury relied upon the wording of the statutes alone that petitioner would be severely prejudiced. The essence of his defense was that he was without requisite knowledge and intent. Counsel's request was appropriate and was made to assure proper consideration by the jury of the charges against petitioner and a fair trial. Moreover, respondent's position that Sections 1001, 1341 and 1343, Title 18, U.S.C. make partial reference to the requisite critical elements does not meet the issue. Moreover, it is pointed out in this regard that petitioner was acquitted of all counts charging him with violations of 18 U.S.C. § 1001.

4. Respondent argues that regardless of the fact that the court of appeals may have incorrectly determined not to remand petitioner's case to the sentencing court for reconsideration of sentence, in view of the reversal of forty-two of the fifty-one counts upon which he stood originally convicted, that petitioner has adequate relief in terms of a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

It is highly unlikely that a sentencing judge would properly consider or reduce a defendant's sentence when the appellate court states that remand for reconsideration was "neither necessary or appropriate". The stance of the appellate court would necessarily have a chilling effect on the sentencing judge. Any reduction of the sentence would be in clear contravention of the posture evidenced by the appellate court. In fact, petitioner did make a Rule 35 motion to the sentencing judge following the decision of the court of appeals. His application was in all respects denied.

CONCLUSION

For the reasons stated in our petition and this reply brief it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH B. EHRLICH,
MARC A. ROSENBERG,
Attorneys for Petitioner,
Office & P.O. Address,
200 Garden City Plaza,
Garden City, New York 11530.
Tel. No. 516-248-4300.

see

75

-

1910